STATE OF MICHIGAN

COURT OF APPEALS

KIMBERLY J. BANKS, Conservator of BRAEJON BANKS, Minor,

Plaintiff-Appellant,

v

HENRY FORD HOSPITAL, a/k/a HENRY FORD HEALTH SYSTEM,

Defendant-Appellee.

UNPUBLISHED
March 27, 2007

No. 260743
Wayne Circuit Court
LC No. 02-242394-NH

Before: Cavanagh, P.J., and Markey and Meter, JJ.

MARKEY, J., (dissenting).

I respectfully dissent. Because reasonable minds could differ regarding whether defendant's conduct was a proximate cause of plaintiff's injuries, the issue is a factual question for the jury to decide. *Babula v Robertson*, 212 Mich App 45, 54; 536 NW2d 834 (1995). Consequently, neither the trial court nor this court should decide the issue as a matter of law.

Plaintiff must prove four elements to establish a prima facie case of medical malpractice:

> (1) the appropriate standard of care governing the defendant's conduct at the time of the purported negligence, (2) that the defendant breached that standard of care, (3) that the plaintiff was injured, and (4) that the plaintiff's injuries were the proximate result of the defendant's breach of the applicable standard of care. [*Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004).]

The proximate cause element consists of two parts: cause in fact and proximate or legal cause. *Id.* at 86-87. Cause in fact requires that a plaintiff establish that the claimed injuries would not have occurred but for defendants' conduct. *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). Here, the majority, in essence, concedes that plaintiff produced evidence from which reasonable minds could conclude that defendant breached the applicable standard of care by failing "to deliver the child earlier by way of a Cesarean section [that] was a 'but-for' cause of the child's brain injury . . . ." Slip op at 3. Yet, the majority finds "a disconnect" between plaintiff's "standard of care" evidence and her "causation" evidence such that the jury not be allowed to decide the issue of proximate causation. I respectfully disagree.

Proximate cause is that which, in a natural and continuous sequence, unbroken by any independent, unforeseen cause, produces the injury. *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985); *Babula, supra* at 54. Under this definition, an unforeseen intervening cause may break the chain of proximate causation. '"An intervening cause breaks the chain of causation and constitutes a superseding cause which relieves the original actor of liability, unless it is found that the intervening act was 'reasonably foreseeable.'" *Id*., citing *Moning v Alfono*, 400 Mich 425, 442; 254 NW2d 759 (1977). The majority opines, "[t]here is no reason to conclude that it was foreseeable that failing to . . . deliver the child by Cesarean section would result in harmful compressive forces that would ultimately damage the child's brain." Slip op at 3-4.

The problem with this analysis is that defendant's failure to perform a C-section resulted in plaintiff's and baby's enduring a prolonged, drug-enhanced, vaginal delivery requiring manual manipulation, which reasonable minds could find ultimately caused the child's brain injury. Once a defendant's "'negligence has been established, the proximate result and amount of recovery depend upon the evidence of direct sequences, and not upon defendant's foresight.'" *McMillian, supra* at 576, quoting *Davis v Thornton*, 384 Mich 138; 180 NW2d 11 (1970), quoting 38 Am Jur, Negligence, § 58, pp 709-710.

That defendant did not foresee the exact mechanism of injury does not necessarily render an intervening cause a liability-relieving superseding cause. "'The intervention of a force which is a normal consequence of a situation created by the actor's negligent conduct is not a superseding cause of harm which such conduct has been a substantial factor in bringing about.'" *Moning, supra* at 442 n 17, quoting 2 Restatement Torts, 2d, § 443.

> "The word 'normal' *is not used* in [§ 443] *in the sense of what is usual, customary, foreseeable, or to be expected.* It denotes rather the antithesis of abnormal, of extraordinary. It means that the court or jury, looking at the matter after the event, and therefore knowing the situation which existed when the new force intervened, does not regard its intervention as so extraordinary as to fall outside of the class of normal events." [*Id*., comment b (emphasis added).]

Generally, whether an intervening act is a superseding cause relieving a defendant of liability is a question of fact for the factfinder. *Meek v Dep't of Transportation*, 240 Mich App 105, 118, 122; 610 NW2d 250 (2000). On this record, whether the harmful compressive forces generated during the prolonged, drug-enhanced, manually manipulated, vaginal delivery were so extraordinary as to be a superseding cause relieving defendant of liability is a question of fact for the jury to resolve. Consequently, I conclude the trial court erred by granting defendant's motion for summary disposition and would reverse.

/s/ Jane E. Markey